IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
APPEAL NO. 33350

A.T. MASSEY COAL COMPANY, INC.,
ELK RUN COAL COMPANY, INC.,
INDEPENDENCE COAL COMPANY, INC.,
MARFORK COAL COMPANY, INC.,
PERFORMANCE COAL COMPANY, and
MASSEY COAL SALES COMPANY, INC.,

Appellants,

v.

HUGH M. CAPERTON,
HARMAN DEVELOPMENT CORPORATION,
HARMAN MINING CORPORATION,
SOVEREIGN COAL SALES, INC.,

Appellees.

RESPONSE OF APPELLEES HARMAN DEVELOPMENT CORPORATION, HARMAN MINING CORPORATION, AND SOVEREIGN COAL SALES, INC.

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RESPONSE OF APPELLEES HARMAN DEVELOPMENT CORPORATION, HARMAN MINING CORPORATION, AND SOVEREIGN COAL SALES, INC.

Appellees Harman Development Corporation, Harman Mining Corporation, and Sovereign Coal Sales, Inc. (collectively "Harman"), by their undersigned counsel, ask again that this Court affirm the judgment of the court below in all respects. In support of this request, Harman relies on all prior briefs submitted by it and by Appellee Hugh M. Caperton, its Petition for Rehearing, this Response to the Supplemental Brief of Appellants, and the Response of Mr. Caperton to the Supplemental Brief of Appellants.

The principal purpose of this brief is to correct the egregious misrepresentations that Massey has made regarding the Virginia proceedings and to provide in their place truthful facts regarding *Sovereign Coal Sales, Inc. v. Wellmore Coal Co.,* Case No. 226-98 (Buchanan County 2000) ("the Virginia Case"), especially as it compares to this case ("the West Virginia Case"), so that the Court has an accurate understanding of the two cases, and thereby may fairly and properly apply the applicable law in this appeal. An accurate understanding of the two cases leads inevitably to the conclusion that the Virginia law of res judicata does not require the reversal of the judgment in this case in favor of Harman and against Massey, a verdict which the Court unanimously concluded was wholly warranted.

This Reply Brief concludes with a brief section addressing the inapplicability of the forum selection clause to the tort claims adjudicated in this case and a brief discussion regarding Justice Benjamin's refusal to disqualify himself from involvement with this appeal.

I. An Accurate Understanding of What Was Decided in the Virginia Case Leads Inevitably to the Conclusion That This Case is Not Barred Under Virginia's Law of Res Judicata

Massey has consistently and egregiously misrepresented what was decided by the jury in the Virginia Case. Massey may think it can get away with this since it failed to submit the record

necessary to carry its burden of establishing that the Virginia Case is a bar to this case under the doctrine of res judicata. This Court should not rely on Massey's version of the facts.

Massey knows that the tort claims raised in this case were not pled, and therefore were never dropped in the Virginia Case. Massey also knows that regardless of what was pled by Harman Mining Corporation and Sovereign Coal Sales, Inc. (collectively "Harman Mining") in the Motion for Judgment in Virginia, what went to the jury there was a single breach of contract claim. Most importantly, Massey knows full well that the evidence submitted in the two cases was not the same and, indeed, could not possibly have been the same, given the very different lengths, subjects, parties and remedies of the two cases.

Once the glaring misrepresentations of Massey are corrected, it is clear that the Judgment of the Circuit Court of Boone County in favor of Appellees should be affirmed by this Court.

A. A Proper Record has not been Set by Massey

Massey misconstrues Harman's argument that Massey has failed to provide the Court with the record it needs to properly address the issue of res judicata. Massey insists that it raised its res judicata defense in the West Virginia Case and, in support of that proposition, it notes that the Virginia Case and the doctrine of res judicata were mentioned in various filings and arguments to Judge Hoke. Supplemental Brief, pp. 31-32 ("a review of the entire record demonstrates that there are numerous references to the Virginia action in a variety of pleadings and numerous attempts by the Appellants to have the trial court dismiss the West Virginia case on res judicata and/or collateral estoppel grounds.").

However, Harman does not dispute that the defense of res judicata was raised; rather, Harman's position is that Massey did not submit sufficient evidence to support the defense. In its arguments, the only documents that Massey references in support of this defense, on which it carries the burden of proof, are the Motion for Judgment that Harman Mining filed to initiate its

action against Wellmore in the Virginia Case, and an Order of the Virginia Supreme Court granting Wellmore's Petition for Appeal. As Massey well knows, the Motion for Judgment was amended and it was the Amended Motion of Judgment[1] that was tried to the jury.

Massey did not submit to Judge Hoke in support of its res judicata argument any portion of the trial transcript, any exhibits admitted at trial, the jury instructions or the verdict slips in the Virginia Case.[2] Had Massey done so, it would be readily apparent that the Virginia Case was very different than the West Virginia Case and that the causes of action and remedies in the Virginia Case and the West Virginia case were strikingly different.

Without a record to contradict it, Massey engages in extensive mischaracterizations of the Virginia Case.

B. The Reason a Detailed Examination of the Evidence in the Two Cases is Required is Because it is the Evidence Actually Adjudicated in Virginia Which Determines Whether the West Virginia Case is Barred by Virginia's Law of Res Judicata

Virginia courts applying a res judicata analysis under Virginia law have consistently reviewed some or all of the record in the two cases at issue to determine whether the first bars the second. Courts applying a res judicata analysis under Virginia law look at the evidence in the two cases to properly analyze whether there is an identity of parties, causes of action and remedies for the purpose of the doctrine of res judicata.

The same evidence test has been consistently used as the touchstone analysis under Virginia law for determining the applicability of res judicata. This analysis requires the Court to

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[1] Massey has never submitted this document into the record.

[2] Oddly, apparently to suggest that it raised and supported its res judicata defense via a Motion to Dismiss after trial of the Virginia Case, Massey attaches as exhibits to its Supplemental Brief two Certificates of Service purportedly to indicate that a Motion to Dismiss and a supporting brief were served on Harman's counsel on December 3, 2001 (the trial of the Virginia Case was concluded in August of 2000). When asked to provide the documents that are referenced in these Certificates of Service, however, Massey's counsel has supplied the undersigned with a Motion to Dismiss and a supporting brief that raise three grounds for dismissal of certain claims and parties in this case but which do not raise the defense of res judicata. (*See* Motion to Dismiss attached here to as Exhibit "A.") This, is another example of a blatant attempt by Massey to mislead this Court.

look not just at the pleadings, but the actual causes of action tried to a jury, and the evidence actually submitted to prove those causes of action.

Appellants' contention that the *Davis v. Marshall, Inc.*, 265 Va. 159, 576 S.E.2d 504 (2003), "same evidence" test for determining whether claims are part of a single cause of action is an "anomaly" and not in effect at any relevant time is simply incorrect. The same evidence test has been utilized by Virginia courts for many years and on a consistent basis – before *Davis*, in *Davis* and after *Davis*. The Supreme Court of Virginia in *Davis* did not declare a new test, but rather quoted the test from *Brown v. Haley*, 233 Va. 210, 216, 355 S.E.2d 563, 567 (1987), which in turn cited cases dating back to 1937 for the same test:

- *Jones v. Morris Plan Bank,* 168 Va. 284, 290-91, 191 S.E. 608, 609-10 (1937) ("One of the principal tests in determining whether a demand is single and entire, or whether it is several, so as to give rise to more than one cause of action, is the identity of facts necessary to maintain the action. If the same evidence will support both actions there is but one cause of action.");

- *Cohen v. Power*, 183 Va. 258, 261, 32 S.E.2d 64, 65 (1944) ("The test generally applied in the application of the doctrine of res judicata is to determine whether the facts essential to the maintenance of the two actions are the same. If the facts or evidence would sustain both actions, then the two actions are considered the same and a judgment in one bars any subsequent action based upon the same facts. If different proof is required to sustain the different actions, a judgment in one is no bar to the maintenance of the other. 30 Am. Jur. 918.");

- *Feldman v. Rucker*, 201 Va. 11, 18, 109 S.E.2d 379, 384 (1959) (Second lawsuit presented another cause of action and a different issue because "its determination was dependent upon different proof and principles of law.");

- *Bates v. Devers,* 214 Va. 667, 672, 202 S.E.2d 917, 922 (1974) (Noting definition of "cause of action" as an assertion of particular legal rights which have arisen out of a definable factual "transaction" but holding that res judicata was not applicable where "the evidence to support one claim was not necessary to support the other.");

- *Wright v. Castles*, 232 Va. 218, 223-24, 349 S.E.2d 125, 128-29 (1986) (citing *Jones* for the proposition that "when 'the same evidence will support both actions there is but one cause of action.'").

As can be seen by this long line of precedent, the "same evidence" test was indeed the law in Virginia long before *Davis*.

The fact that *Davis* cited to the definition of "cause of action" found in *Allstar Towing, Inc. v. City of Alexandria*, 231 Va. 421, 344 S.E.2d 903 (1986) does not change the "same evidence" test. The *Allstar Towing* definition came from *Bates*, which, like Davis, applied the "same evidence" test. Moreover, *Allstar Towing's* determination that the same cause of action was not involved in the two cases under consideration was not surprising or inconsistent with the "same evidence" test, given the fact that the "facts giving rise to the second cause of action were not even in existence when the first action was heard and decided on the merits . . . ." *Allstar Towing*, 231 Va. at 424-25, 344 S.E.2d at 905-06.[3]

Massey's comparison of the complaints in Virginia and West Virginia is not the proper inquiry, given the "same evidence" test of *Davis* and *Brown*, dating back to *Jones* in 1937 and applied until at least July 1, 2006,[4] the effective date of Rule 1.6,. The test is not whether the initial or even the amended pleadings were similar in the two cases; the issue is whether the factual proof required and evidence submitted in the two cases was the same. If not, the cases did not present the same causes of action.

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[3] *Gimbert v. Norfolk S.R. Co.*, 152 Va. 684, 148 S.E. 680 (1929), does not, as Massey contends, demonstrate that prior to *Davis* the transactional approach was consistently applied in Virginia to determine identity of causes of action, particularly in light of the long line of above-cited precedent. Indeed, *Gimbert* merely concerned the issue of whether a demurrer in a prior action was a decision on the merits.

[4] Appellees state that *Davis* has not been cited with approval or followed by any subsequent Supreme Court of Virginia decision. (Supplemental Brief, p. 21, fn. 5.) However, *Davis* has not been criticized by any other decision of any other court either, and, indeed, the "same evidence" test continues to be consistently applied in relatively recent cases by Virginia circuit courts and federal courts in Virginia. *See e.g. Odeneal v. Thompson*, 2003 WL 22518523 *2 (Va. Cir. Ct. 2003); *MDM Associates v. Johns Brothers Energy Technologies, Inc.*, 2003 WL 24291248, *2 (Va. Cir. Ct. 2003); *Stigall v. Thompson*, 2003 WL 24117701 * 2-3(W.D. Va. 2003); *Field Auto City, Inc. v. General Motors Corp.*, 476 F. Supp.2d 545 (E.D. Va. 2007).

An application of the same evidence test and a review of an accurate record (or accurate representations regarding the record) readily demonstrates that what was tried in Virginia was not what was tried in West Virginia and this case is not barred by res judicata.

C. It Is Simply Not True That the Tort Claims Brought in this Case Were Ever Pled in Virginia

It would make little sense to confine a res judicata analysis in any case to a review of the pleadings, and it certainly makes no sense at all to confine it to a complaint that was amended. Res judicata, a Latin term, literally means "the thing has been adjudicated." As any lawyer knows, a case often changes along the way to trial – issues are narrowed, causes of action may be dismissed or dropped. This is why any res judicata analysis hinges on what was actually tried, that is, the thing that was adjudicated.

Plaintiffs' Motion for Judgment in Virginia indeed stated that their business was destroyed. However, the Motion for Judgment was amended for the purpose of clarifying, *inter alia,* that the plaintiffs were seeking only contract damages pursuant to the Uniform Commercial Code. (Motion for Judgment, ¶ 1 and p. 17: "Request for Relief.") As the Virginia trial court held, and so instructed the jury, the only cognizable relief for breach of contract under applicable Virginia law was one year's worth of contract damages, not damages for the destruction of plaintiffs' business. (*See* Virginia Damage Trial Jury Instructions, Instruction No. 10, attached hereto as Exhibit "B.")

Furthermore, it is simply not true 1) that tort claims were ever asserted in Virginia; and 2) even more importantly, that the tort claims (and underlying facts to support them) asserted against Massey in this proceeding were originally asserted in Virginia, but were withdrawn. (Supplemental Brief, pp. 5, 28) ("Appellees initially brought their tort claims in Virginia and then dismissed them.").

Tort claims were never asserted in Virginia. Rather, the Motion for Judgment originally filed by the two plaintiffs in the Virginia Case contained two causes of action: 1) breach of contract; and 2) breach of the contractual covenant of good faith and fair dealing. Under Virginia law, breach of the covenant of good faith and fair dealing is not a tort claim. (*See, e.g., Charles E. Brauer Co., Inc. v. Nationsbank of Virginia, N.A.*, 251 Va. 28, 966 S.E.2d 382 (1996) ("...while a duty of good faith and fair dealing exists under the U.C.C. as part of every commercial contract, we hold that the failure to act in good faith under § 8.1-203 does not amount to an independent tort. The breach of the implied duty under the U.C.C. gives rise only to a cause of action for breach of contract.").

Indeed, plaintiffs in the Virginia case made it clear that they were not seeking to assert a tort claim against Wellmore, as Count I of the Motion for Judgment is entitled "Breach of Contract" and Count II is entitled "Breach of *Contractual* Duty of Good Faith and Fair Dealing." (Motion for Judgment, pp. 15, 16.) Not one of the five causes of actions originally pled in West Virginia was ever pled in the Virginia Case, and not one of the 23 paragraphs listed within the enumerated causes of action (Counts I-V) in the West Virginia Case is the same or even similar to what was pled in Virginia.

Equally important, the underlying facts giving rise to the claims alleged in the Virginia Case did not give rise to tort claims against Wellmore. Nothing alleged therein gave rise to claims for fraud, tortious interference or any other tort by Wellmore. The facts alleged also did not give rise to tort claims against Massey. Massey was not a party to that action and the many facts giving rise to tort liability on the part of Massey – motive; wrongful intent; unlawful scheme; purchase of United with intent to interfere; directive to breach; fraudulent misrepresentation of intent to buy Harman assets; purchase of wall of coal; interference with Harman's contract with Penn Virginia; acts to gain leverage over Harman and to inflict financial

distress; intent to acquire Harman free of union liabilities; improper involvement in Harman's bankruptcies – were not alleged in the Virginia Case.[5] It was only in the West Virginia Case that those very substantial facts giving rise to liability on behalf of Massey were pled.[6]

It is astonishingly disingenuous for Massey to now represent to this Court that the complaint filed in this proceeding was "essentially identical" to the Motion for Judgment filed in the Virginia Case. (Supplemental Brief, p. 27.) In fact, the Amended Complaint in the West Virginia Case contains over *150 paragraphs* that are not contained in the Amended Motion for Judgment. The complaint in this case alleges detailed facts and categories of facts that are not mentioned in the Virginia Case. Exhibit C hereto contains a listing of the factual allegations made in West Virginia which were not made in the Virginia Case.

Finally, as exhaustively discussed in Appellees' Rehearing brief, even if the Massey defendants could have been joined in the Virginia Case, and even if causes of action against Massey could have been alleged and those tort claims joined in the Virginia Case, Virginia does not have a mandatory joinder rule that would have required the joinder of all parties and all claims simply because they might arise out of related facts.

D. The Record in the Virginia Case Clearly Indicates that What Was Tried Was What Was Pled, One Simple Breach of Contract Claim Against Wellmore, and Not the Tort Claims against Massey

1. The Virginia Case

Without presenting this Court with any part whatsoever of the trial record of the Virginia Case, Massey consistently mischaracterizes it, repeatedly suggesting that the evidence in that

[5] Even in the original Motion for Judgment where breach of the covenant of good faith and fair dealing was pled, the lone fact giving rise to the claim, as alleged, was "Wellmore acted in bad faith in claiming that an event of force majeure occurred." (Motion for Judgment, ¶ 53.)

[6] Indeed, in the Virginia Case, the Circuit Court took pains to make sure, at Wellmore's request, that facts giving rise to tort liability on the part of Massey did not come into that case. This is not because the plaintiffs in Virginia abandoned those claims. It is because the plaintiffs in Virginia never asserted facts giving rise to tort claims in Virginia, did not plead tort claims, and indeed could not have done so against Wellmore.

case and the West Virginia Case was "essentially the same." (Supplemental Brief, pp. 23-24.) This mischaracterization is yet another attempt to mislead this Court. In fact, the vast majority of the evidence in this case, which proved Massey's malicious intent and wrongful conduct, was not submitted in the Virginia case, nor would it have been permitted given the narrow issue before the jury –whether Wellmore had a legitimate excuse under the Coal Supply Agreement ("CSA") to purchase less coal than it committed to purchasing under the contract.

In the Virginia case, the issue revolved around the projected shutdown by LTV Steel Corporation ("LTV") of its coke plant in Pittsburgh, one of three coke plants then operated by LTV. LTV had historically purchased much of its coal from United Coal Company, Wellmore's parent, that included both coal mined by United and Harman coal. (LTV referred to this as its Premium Blend.) Wellmore maintained that it was excused from its obligation to purchase coal under its long-term CSA with Harman because the shutdown was unforeseen, beyond its control and the result of government action, which, in turn, it argued, constituted a force majeure event within the meaning of the contract. Harman countered with evidence that LTV was not one of Wellmore's customers and that, in any event, the shutdown was economic in nature and was neither unforeseen nor the result of a government closure. Thus, Harman argued, the shutdown did not constitute an event of force majeure under either the contract or long-standing legal precedent.

The evidence in the Virginia Case thus focused on statements and actions of both LTV and state and federal environmental agencies. The issues were: Why did LTV shut down its Pittsburgh plant; what government action had been taken; was the plant going to close a result of a government agency ordering it to shut down or simply because the plant was old and too costly to bring into compliance with air pollution regulations and was LTV even a customer of Wellmore in 1998? Wellmore provided evidence of air pollution violations issued by the EPA

and the cost to LTV to come into compliance at this plant, arguing that together these constituted evidence of a "de facto shutdown." Harman submitted evidence that the plant at issue was going to close only after a long planning process by LTV and a financial decision that was long anticipated – not the kind of sudden and unforeseeable event that the force majeure provision was intended to protect Wellmore against. Harman also countered with evidence of a "de facto government shutdown" with testimony of EPA and state officials that they had never issued a shutdown order and in fact had encouraged LTV to keep the plant open.

Thus, the Virginia Case revolved around the meaning of the CSA's force majeure provision and whether LTV's lessened demand for coal from United constituted a force majeure event. Intent was not an issue. Whether Massey had committed frauds or tortiously interfered was not at issue. Whether Massey destroyed Harman's business or caused personal injury to Caperton was not at issue.

As Wellmore's counsel stated at the outset of the trial in the Virginia Case:

> Mr. Woods: I've got to say that I don't really foresee a problem getting done this week; its... There's a number of witnesses listed, but the scope of the testimony is just not that broad.
>
> * * *
>
> We understand that the issue here is very simple is, was there a force majeure event at the LTV Pittsburgh plant. [A]ll of these issues about what Massey did and all of these issues about what their motive was and what they knew at the time and what they relied upon and the fact that Massey bought Wellmore knowing that some announcement had already been made [are not relevant] when the issue is, is this a breach of contract...

(3/20/00 Virginia Trial Transcript, Day 1, Vol. 1, pp. 4, 8.)

The length of the Virginia trial and the testimony presented was, thus, narrowly focused and streamlined. The liability trial began on March 20, 2000. Plaintiffs called two witnesses during their case-in-chief. Plaintiff's first witness, Hugh Caperton, began his testimony late in

the afternoon (3:15 p.m.) on March 20th, and his direct and cross-examinations were completed the following morning, March 21, 2000. (Caperton did not testify in his personal capacity, but only in a representative capacity as an officer of the two Plaintiff corporations.) Plaintiffs' next witness, Henry Cook, completed his testimony shortly after lunch that day. All told, the Plaintiffs' case-in-chief on liability consisted of two witnesses, took approximately 5 hours (including cross-examination), and generated a transcript of 214 pages. On March 24, 2000, Plaintiffs' put on their rebuttal case in approximately one hour and fifteen minutes. Plaintiffs submitted 12 exhibits. Indeed, the entire liability trial in Virginia – including jury selection, openings, closings and jury deliberations – took only one week.

The damage trial in the Virginia Case (discussed below) required slightly more time, eight and one-half days, as it necessarily involved testimony from a number of expert witnesses on the subject of the amount of profit on the contract that was lost in 1998. Plaintiffs never sought nor proved damages for the destruction of Harman's business.

The Virginia Case was quickly tried because intent, motive, and Massey's acts before acquiring United and after disposing of Wellmore did not give rise to liability on the part of Wellmore and had no bearing on the limited breach of contract issue in the Virginia Case. In contrast, Plaintiffs' case-in-chief in the West Virginia Case commenced on June 18, 2002 and ended 16 1/2 trial days later on July 17, 2002. In total, the West Virginia matter took 27 days to try.

Only eleven of the 142 exhibits introduced in this case were introduced by Plaintiffs during the trial of the Virginia Case. Exhibits 133, 135, 194, 235, 267, 269, 309, 340, 352, 380 and 549A-D in the West Virginia Case were also admitted in the Virginia Case. (A description of the exhibits that were submitted in both cases by Plaintiffs is attached hereto at Exhibit D.)

2. The West Virginia Case

On the other hand, 128 exhibits introduced by Plaintiffs and admitted in the West Virginia Case were not admitted in the Virginia Case. Exhibits 6, 13, 14, 16, 22, 27, 27a, 29, 34, 38, 40, 45, 49, 58, 68, 69, 73, 96, 119, 120, 123a, 123, 124, 125, 126, 136, 139, 142, 145, 150, 155, 156, , 188, 208, 213, 218, 219, 225, 226, 237, D243, 244, D246, 252, 253, 253a, 275a, 288, 294, 297, 300, 310, 310a, 311, 313, 315, 320, 328, 333, 334, 335, 337, 350a, 353, 359, 367, 370, 374, 378, 379, 381, 385, 389, 391, 408, 428, 429, 435, 437, 439, 441, 445, 451, 452, 458, 469, 475, 477, 479, 481, 503, 519, 520, 533, 535, 543, 555, 556, 561, D565, 572, 582, 606, 618, 620, 621a - c, 623, 624, 624a, 625, 626, 627, 629, 630, 632, 633, 634, 636, 637, 638, 640, 642, 644, 645, 646, 647 were admitted in the Boone County trial but were not submitted in the Virginia Case. (A description of the exhibits that were submitted in this case but not the Virginia Case is attached hereto at Exhibit E.)

All these additional exhibits – as well as additional witnesses and different areas of testimony – were required because numerous categories of facts had to be and were proven in West Virginia that were not proven in Virginia and, in fact, would not have been permitted in Virginia.

For example, one of the elements necessary to establish the torts of fraud and tortious interference is proof of wrongful intent. Much of the evidence in West Virginia detailed not only the many acts that Massey took over a long period of time (before, during and after it owned United), but also whether Massey acted with unlawful intentions. Massey disputed evidence of malicious intent and itself entered a substantial amount of evidence on the point. As Massey's counsel successfully argued, the relevancy door was wide open because, "Your Honor, as both the plaintiffs and the Court has said many times, *this is a case about intent....*" TT 7/18/02, pp. 45-46. Thereafter, Judge Hoke reiterated rulings that he made throughout the trial that allowed

the parties to submit evidence to establish or to refute "the mindset [of Mr. Blankenship and the Defendant corporations] for purposes of motive, plans, schemes - intention being the outcrop of all of that evidence." *Id.*, pp. 46-47. As a result, numerous witnesses in the West Virginia Case testified at length regarding statements and acts which were made or undertaken, and circumstances establishing or refuting motives, which were properly admitted in the West Virginia Case, but were strictly precluded in the Virginia breach of contract action.

In addition to the testimony of many witnesses bearing on the scheme to destroy Harman and acts taken pursuant to the scheme over a long period of time, exhibits were admitted for the purpose of establishing motive and wrongful intent which would have never been permitted in the breach of contract action against Wellmore. For example, in the West Virginia Case, plaintiffs submitted Massey's internal analysis of its proposed acquisition of United. (PX 27a; PX 244.) Those documents established what plaintiffs pled in the West Virginia Case – that Massey had enormous financial incentive to switch LTV business to certain Massey operations and to acquire Harman or otherwise exert improper influence and control over Harman.

Evidence was also elicited proving the allegation that Massey, prior to acquiring United, guaranteed the salary of United's chief salesmen so that Massey's interference with LTV's business relationship with United Coal and Massey's interference with Harman would not adversely affect that salesman's compensation. (PX 642.) This evidence, of course, was not elicited and would not have been permitted in the Virginia Case.

Similarly, there were literally days of testimony in the West Virginia Case regarding the many acts that Massey took, separate and apart from its directive to Wellmore to breach its contract with Sovereign Coal Sales. This evidence was not elicited and would not have been permitted in Virginia as it was conduct committed by Massey, not Wellmore, and it was totally

irrelevant to the issue of whether Wellmore breached its contract – the only matter at issue in the Virginia Case.

For example, hours of testimony from Harman, Massey, and Penn Virginia representatives in this case established what occurred during the several month period in which Massey misrepresented its intention to purchase assets from Harman, engaged in ruse negotiations with both Penn Virginia and Harman, and ultimately collapsed the transaction for the purpose of causing financial distress to Harman. The witnesses who testified regarding this matter included Massey's then-CFO, Ben Hatfield, Massey's CEO, Don Blankenship, Harman Development Corporation's President, Hugh Caperton, Harman Mining Company's President, Henry Cook, and Penn Virginia Company's CEO and President, Keith Horton.

During Mr. Horton's testimony (by video tape deposition), Mr. Horton explained how and why Penn Virginia entered into a sale and lease back transaction with Harman Development Corporation for the coal reserves being mined at the Harman Mine. He testified regarding terms of the lease and he explained, both generally and very specifically, typical terms in coal leases and how leases of coal reserves work. (TT 6/28/02, pp. 69-84.) He testified at length regarding the extensive negotiations between his company and Massey over an assignment of the coal lease which would be necessary for Massey to go forward with its offer to acquire the assets of Harman. (*Id.*, pp. 94-133.) He then testified regarding Massey's last minute dramatic changes to the assignment which Mr. Horton believed were totally unreasonable, were proposed without explanation, and ensured that the assignment would not occur. (*Id.* at 129-133.) None of this testimony was elicited in the Virginia Case.

Likewise, extensive evidence, including the testimony of numerous witnesses and the submission of many exhibits, was introduced regarding Massey's purchase of a "wall of coal" adjacent to the Harman Mine. Massey, through several of its witnesses (Ben Hatfield, Don

Blankenship, James Campbell) vigorously disputed plaintiff's claims relative to this coal acquisition. Massey's witnesses disputed plaintiff's contention that it was a wall of coal, disputed that it was acquired for any wrongful intentions vis-à-vis Harman, and even claimed that the idea to purchase this segment of coal reserves was not its own but was the idea of Pittston Coal Company arising out of an entirely separate transaction.

Plaintiffs demonstrated Massey's version of events was untruthful by offering emails and other documents into evidence which showed without a doubt that the coal reserves purchased by Massey constituted a wall of coal which Massey asked Pittston to sell to them for the sole purpose of interfering with Harman. *See* PX 533, Hatfield email ("This will be a fairly effective block which will likely ensure that we get Harman in the long run.").

3. The Differing Testimony of the Overlapping Witnesses in the Two Cases

The fact that a number of the witnesses who testified in this proceeding also testified in the Virginia case is another superficial argument advanced by Massey to support its assertion that the evidence in the two cases was the same. However, even the most cursory examination of the record in the two cases readily shows that where the same witness testified in the two proceedings, the scope and subject matter of the testimony was very different in the two proceedings.

For example, Massey's CFO, Ben Hatfield, testified at both trials. In the Virginia Case, Hatfield's testimony was extremely brief – limited to his recollection concerning the loss of the LTV business and whether such an event constituted force majeure under the CSA. This testimony comprised only eight transcribed pages. When Harman's counsel attempted to question Mr. Hatfield regarding Massey's purchase of United, the Virginia judge ruled the testimony was not relevant. (3/22/00 Virginia Case transcript, pages 106 - 114.)

In the West Virginia Case, on the other hand, Hatfield's testimony involved a variety of issues, including but not limited to, Massey's purchase of United Coal, Massey's proposed acquisition of Harman, Massey's use of Harman's confidential business information, discussions with Penn Virginia on the assignment of Harman's mineral lease, and Massey's acquisition of the band of coal surrounding the Harman property from Pittston. Indeed, Hatfield's trial testimony in this matter spanned two trial days and constitutes approximately 230 pages of transcript. (TT 7/29/33, pp.9 - 148; TT 7/30/02, pp. 6 - 99)

Hugh Caperton, as would be expected, also testified in both cases. In the Virginia Case, Caperton's direct examination in the liability trial lasted approximately 3 hours. He testified regarding the terms of the contract, his understanding of the force majeure provision, the letter he received from Wellmore in August of 1997, the force majeure letter he received in December, and discussions with Wellmore representatives regarding the legitimacy of the force majeure. He did not testify as to events from January through March of 1998 when Massey reneged on its offer to purchase the assets of Harman and the fraudulent misrepresentations made in connection thereto; Massey's acquisition of the wall of coal; the ruse negotiations between Massey and Harman's leaseholder; or any subsequent acts committed by Massey. Nor, of course, did he testify regarding his own personal injuries. In the West Virginia Case, on the other hand, Caperton's testimony spanned five days and included extensive testimony regarding all of these various acts, omissions, frauds, and interferences committed by Massey.

Similarly, Blankenship's testimony (via deposition) was extremely narrow in the Virginia Case. This testimony was limited to his role and knowledge regarding: 1) what coal blends were proposed to LTV for 1998; and 2) his view on whether Wellmore's force majeure declaration was valid. This testimony came in during Plaintiffs' one and a half hour rebuttal case in the liability phase.

Conversely, in the West Virginia Case, Mr. Blankenship testified extensively as to Massey's motive, intent and conduct with respect to Massey's acquisition of United; Massey's motive, intent, and role in the declaration of force majeure; Massey's motive and intent as to Massey's proposed acquisition of Harman; Massey's motive and intent as to its acquisition of property adjacent to the Harman property; his personal views on business ethics; and his views of Hugh Caperton's ability as a businessman. This testimony came via live testimony and readings and video presentations from his three separate depositions. His live testimony alone spanned two days and comprised 229 pages of the transcript. (TT 7/18/02, pp. 38 - 142; TT 7/22/02, pp. 17 - 152).

D. Injury and Damages Flowing from Massey's Destruction of Harman Was Not Adjudicated and Could Not Have Been Adjudicated in the Virginia Case

Although the Appellants' represented that Plaintiffs pled the destruction of their business in the Virginia Case, which is not correct, the Virginia Trial Court unquestionably ruled that the damages Plaintiffs were entitled to recover in that action were "lost profits" under the contract (CSA), for one year (1998) only, to be measured in accordance with section 8.2 - 708(2) of the Uniform Commercial Code. (*See* Exhibit B, Virginia Case Jury Instruction No. 10.)

Consistent with this ruling, the Virginia Plaintiffs presented evidence through their expert, Mark Gleason, that absent Wellmore's breach of the Coal Supply Agreement, they would have received over $19,000,000 in revenue for coal in 1998 that would have cost approximately $14,000,000 to mine. Mr. Gleason then factored in certain additional items consistent with the applicable U.C.C. section (§ 8.2 - 708(2)), and determined the damages amounted to approximately $6,000,000.

At the close of evidence, the Virginia Court then instructed the jury that it was to determine:

A: Whether Harman would have performed its contractual obligations had not Wellmore breached the contract.

B: Whether Harman suffered any damages as a proximate result of Wellmore's refusal to purchase the full 573,000 tons of coal from Harman in 1998.

C: Whether Harman reasonably mitigated its damages.

D: If Harman suffered any damages that it could not reasonably mitigate, what is the reasonable amount thereof.

Id. The jury found in favor of the Virginia Plaintiffs and awarded damages of $6,000,000.

The damages of the three corporate plaintiffs in the instant matter were determined consistent with the standard this Court established for the destruction of a business – that being "the difference in fair market value of the business before and after its destruction." *Lively v. Rufus*, 207 W.Va. 436, 444, 533 S.E.2d 662, 670 (2000). Consistent with the standard established by Lively, once the Corporate Plaintiffs established that Massey destroyed their business, they presented evidence that the difference in the fair market value of their business, pre and post destruction, amounted to $29,696,000.00, including pre-judgment interest. PX 621, TT 7/15/02, pp. 173:15 - 174:3.

Unlike the damages awarded in the Virginia matter, these damages recognized that the Corporate Plaintiffs' business had been completely destroyed, causing the loss of the value of their mining equipment and related assets, the loss of the value of their coal lease with Penn Virginia, and most importantly, the loss of the ability to conduct future business and collect revenue of approximately $25,000,000 per year, causing Harman to be unable to satisfy many long standing obligations, including but not limited to, retiree health and medical benefit costs, reclamation liabilities and payments to lenders, equipment manufacturers and material vendors.

PX 621, TT 7/15/02, pp. 200:4 - 201:19. Claims for payment of these obligations have been asserted against the Corporate Plaintiffs in the bankruptcy actions. Further, these damages also consider additional liabilities the Corporate Plaintiffs have suffered by virtue of their business being destroyed, such as bankruptcy administration costs of over $530,000 and other expenses, including equipment recovery costs and increased workers compensation claims, totaling approximately $2,300,000 that were triggered as a direct result of Massey's conduct. PX 621, TT 7/15/02, pp. 189:12 - 190:10. Contrary to Massey's characterization that the damages in the two cases are the same, these damages are vastly different than the "lost profits" the Virginia Plaintiffs were determined to have incurred in 1998 due to Wellmore's breach of the Coal Supply Agreement.

In addition, the jury in this matter also had to determine the damages that Caperton – not a party to the Virginia matter – incurred individually. In this regard, Caperton presented evidence that that he personally suffered compensatory damages as a result of Massey's conduct of between $6,255,412 and $7,622,006, in the form of lost income capacity and creditworthiness. PX 630. Caperton also suffered injury to his reputation and emotional/physical harm, in an amount that was ultimately determined by the Jury.

F. The Claims and, Therefore, the Jury Instructions, were Vastly Different in the Two Cases

Massey chose not to submit any portion of the trial transcript in the Virginia Case to support its defense of res judicata. Had it submitted even the jury instructions and the verdict slips in the Virginia Case, it would be readily apparent to this Court that the claims and causes of action in the two cases were fundamentally different.

The very limited nature of the contract issues in the Virginia Case are evident from a review of the Jury Instructions and the Verdict Slips in that case. (Pertinent Jury Instructions

from the liability phase of the Virginia Case attached hereto as Exhibit G; Verdict Slips in the Virginia Case attached hereto as Exhibit H). The many acts that Massey took before and after its acquisition of Wellmore, and the many acts that gave rise to tort claims against Massey, were not relevant to the issues alleged or tried in the Virginia Case, and therefore, the causes of action are fundamentally different.

At the close of the liability phase of the trial in the Virginia matter, the jury was simply presented with the following:

> The issues in this matter for you to decide are:
>
> A: Whether Wellmore refused to purchase the 573,000 tons of coal from Harman in 1998.
>
> B: Whether there was a force majeure event at the plant or facility of a Wellmore customer, LTV Steel Corporation.
>
> C: Whether the force majeure event prevented Wellmore from supplying the coal it would have otherwise supplied to LTV.

(Instruction No. 1)

Conversely, in the West Virginia Case, the jury was required to make findings as to the separate claims of tortious interference, fraudulent misrepresentation and fraudulent concealment brought by both the Corporate Plaintiffs and Caperton against Massey in order to determine liability. (*See* Judge Hoke's Jury Instruction, No. 21.)

Clearly the parties were different, the causes of action and their elements were different, and, thus, the jury in the West Virginia Case did not decide the issues that the jury in the Virginia Case decided, and vice versa. As the causes of action were fundamentally different, the doctrine of res judicata does not preclude the last-decided case.

II. Massey's Latest Arguments regarding Application of the Doctrine of Res Judicata are Meritless

In their Supplemental Brief, Massey contends that Massey and Wellmore were privies in Virginia because Massey provided a complete defense and indemnification to Wellmore in that action. Massey cannot rely on this basis because it did not provide any evidence in the record to support this assertion. Again, Massey asks the Court to accept a proposition clearly capable of being proved on the basis of its word alone. In fact, in the Virginia Case, the new owner of Wellmore described the indemnity agreement between Wellmore and Massey as "limited." There is simply insufficient evidence before the Court to allow it to draw any conclusions about this basis for a finding of privity at all.

In any event, the cases relied on by Massey do not stand for the proposition that such an indemnification agreement alone would result in a finding of privity. Rather, as these cases make clear, Massey had to have an interest in the matter adjudicated quite separate from the indemnification agreement to allow it to claim privity status.

In *City of Richmond v. Davis*, 135 Va. 319, 116 S.E. 492 (1923), the City sued a foreman working on a building for the State Military Board claiming the building violated city fire limits. The foreman prevailed on the ground that his actions were authorized by the Board and therefore acts of the State. Then the City sought an injunction against the Board compelling the removal of the building. The court, noting that the foreman had no personal interest in the earlier matter, held that the Board was in privity with its foreman in the first action and that the City, therefore, was barred from bringing the second action because, had the outcome in the first action been the reverse, the Board would have been liable for the acts of its foreman agent. Massey has repeatedly disavowed any vicarious liability for the acts of Wellmore, and standard principles of

the law of corporations would not allow Harman to collect its judgment against Wellmore from Massey.

The quote attributed by Appellants in their brief to the *City of Richmond* case (the quote is actually from the case of *Souffrant v. La Compagnie Des Sucreries*, 217 U.S. 475 (1910)) makes clear that the principle recited applies where the master or principal is acting in the first case to "protect his own right" or "in aid of some interest of his own."

Similarly, in *Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt International B.V.*, 327 F.3d 173, 185 (2d Circuit 2003), the Second Circuit made it clear that privity can be based upon representation "only if the interests of the person alleged to be in privity were 'represented [in the prior proceeding] by another vested with the authority of representation.'" (Internal citations omitted). The Second Circuit also noted that privity is "a factual determination of substance, not mere form" and "must not be applied mechanically." *Id.* at 186. The Second Circuit then went on to find no privity existed in the case before it.

Massey had no right or interest of its own at stake in Virginia. That action was for a straightforward breach of contract by Wellmore for which Massey could not be held liable to the Virginia plaintiffs. Thus, Massey and Wellmore cannot be considered privies for purposes of res judicata. Despite this, Massey also argues its rights and interests were identical to Wellmore's because they were parent and sub-subsidiary at some time in the past. Neither case relied on by Massey for this proposition stands for any such thing.

CDM Enterprises, Inc. v. Cmwlth., Manufactured Housing Board, 32 Va. App. 702, 530 S.E.2d 441 (2000), does not even involve a parent and subsidiary. There, a wife was precluded from recovery against a home builder where liability and damages were previously adjudicated in a case brought by both husband and wife against the builder. Not only was the prior decision

binding upon both husband and wife, the builder asserting res judicata was liable to both husband and wife under the first judgment. Obviously, the wife was precluded from suing him again.

Mullins, supra, involved a subsidiary corporation claiming that a prior action against its parent was res judicata. The parent would have been liable in the first action, if at all, based only upon respondent superior, so the parent was defending the actions of the subsidiary in the first case. The actions of the subsidiary having already been adjudicated, therefore, the subsidiary was then able to claim res judicata in the second case.

The case at bar is the reverse of *Mullins*. Here the subsidiary – Wellmore – was sued first. No interest of Massey's was at stake in Virginia, nor was Wellmore defending any interest of Massey's.

III. Long Established Rules of Contract Interpretation Dictate that Harman's Claims Against Massey Are Not Within the Scope of the Forum Selection Clause in the Harman-Wellmore CSA

Massey intermingles a variety of propositions, derived from cases in various jurisdictions, to conclude that it, the tortfeasor that destroyed a contract it was not a party to, ought to be able to invoke that contract's forum selection clause and thereby be absolved of liability for the judgment rendered against it by a Boone County judge and jury. Appellees respectfully suggest that the Court, if it indeed considers making new law, should not lose sight of bedrock principles of contract law.

A forum selection clause is a contract entered into between two or more parties for the purpose of agreeing in advance where disputes requiring litigation will be resolved between or among the parties. A forum selection clause, therefore, like any provision in a written contract, is interpreted to give effect to the intention of the contracting parties. "The objective of interpretation in the general law of contracts is to carry out the understanding of the parties rather

than to impose obligations on them contrary to their understanding: 'the courts do not make a contract for the parties.'" Rest. 2d of Contracts, Section 201, comment c.

The relevant understanding is the expectation of the parties at the time of contracting. "In interpreting the words and conduct of the parties to a contract, a court seeks to put itself in the position they occupied at the time the contract was made." *Id.*, Section 202, comment b.

Clearly, the parties to a contract containing a forum selection clause expect that *they* will be bound by their agreement and that *their* disputes arising out of the contractual relationship will be covered by the clause. To extend the reach of the clause beyond that – to claims that do not implicate the terms of the contract and to parties who are not signatories to the contract – requires a rationale equally embedded in the intention of the parties at the time of contracting. That rationale can only be found in the legal principle that parties to a contract are bound by the meaning not only that they actually have in mind at the time of contracting, but also by any meaning that they have reason to know. However, "[n]either party is bound by a meaning unless he knows or has reason to know of it." *Id.*, Section 220, comment b.

Courts have recognized these bedrock principles of contract law apply in connection with forum selection clauses. When it comes to determining what claims come within the scope of a given forum selection clause, courts turn first to the language of the forum selection clause at issue – as indeed this Court did. When it comes to determining whether a non-signatory of the contract can enforce the clause, the courts frequently speak in terms of whether the parties could have foreseen – or put another way, would have had reason to know – that the non-signatory would be afforded the protection of the clause.

Thus, the question before this Court is whether, at the time of contracting, the three parties to the CSA intended – as manifested by their words – to require trial of this tort action against the Massey companies to take place in Buchanan County, Virginia. Is it possible to

believe that either Harman or Wellmore intended that in the event that a third party purchased Wellmore's parent for the purpose of interfering with Harman, then undertook extensive actions for the purpose of assuring Harman's destruction, that any case brought as a consequence of such actions must be tried in Virginia? In fact, neither Harman nor Wellmore could possibly have had any such thing in their minds, nor could they have reasonably foreseen such a thing.

Applying a standard contract analysis to this question of contract interpretation results in the inevitable conclusion that Massey cannot enforce the forum selection clause in the CSA to require the claims brought against it in this case to be brought in Virginia. It simply is not possible for Massey to establish that the relevant contracting parties (Sovereign Coal Sales, Harman Mining Company and Wellmore) intended to include within the scope of the forum selection clause the kind of claims brought in this case, against a stranger to the contract, for non-contract damages.

A. Harman had no Reason to Know that the Claims in this Case Would be Within the Scope of the Forum Selection Clause

Harman's claims against Massey were not premised on obligations and duties owed under the contract or on conduct undertaken pursuant to the contract; thus, it is impossible to believe that the parties to the contract intended to include them within the scope of the forum selection clause.

Courts from other jurisdictions have applied forum selection clauses to tort claims when: (1) the duty allegedly breached arises from the contractual relationship; and/or (2) the conduct complained of was undertaken pursuant to the contract. An example of the first kind of case involving a duty owed by defendant to plaintiff which arises from a contract is *Doe v. Seacamp*, 276 F.Supp.2d 222 (D.Mass. 2003). In *Doe,* the plaintiff-mother and defendant Seacamp entered into a contract providing for the plaintiff-son to attend defendant's camp in Florida, where he was

sexually assaulted by a counselor. *Id.* at 223. Plaintiffs brought nine causes of action against Seacamp in Massachusetts, including breach of contract, seven tort claims, and a claim for violation of a Massachusetts statute. *Id.* The court granted Seacamp's motion to dismiss for improper venue based on a forum selection clause providing that "venue for any action arising out of, or related to, this contract shall be in ... Florida." *Id.* at 227.

The court found that all of the non-contract counts were premised on a duty owed by defendant to plaintiffs which would not have existed but for the contract. "'[T]he basic source of any duty owed by Defendants to the Plaintiffs is derived from the contractual relationship structured by the underlying agreement.'" *Id.* at 227-28. Finding each of the nine counts were based on the same operative facts, the court characterized them as "artful pleading" designed to avoid the forum selection clause. *Id.* at 228. *See also Dexter Axle v. Baan*, 833 N.E.2d 43, 50 (Ind.Ct.App. 2005) ("[A] dispute over a contract does not cease to be such merely because instead of charging breach of contract the plaintiff charges a fraudulent breach, or fraudulent inducement, or fraudulent enforcement.").

An example of the second kind of case involving tortious conduct undertaken pursuant to a contract is *Roby v. Lloyd's*, 996 F.2d 1353 (2d Cir. 1993). The plaintiffs in *Roby* complained of misrepresentations made in the course of the sale of Lloyd's securities to them, giving rise, they claimed, to violations of RICO and federal securities laws. *Id.* at 1356. The Court of Appeals affirmed the trial court's dismissal of the action pursuant to a forum selection clause in the sales agreements by which plaintiffs purchased their securities. As in *Doe,* the clause at issue covered disputes "relating to" the contracts, as the misrepresentations were allegedly made during the sale process and therefore, related to the agreements.

In *Roby,* the court complained of the attempt by plaintiffs to plead around the forum selection clause. "We refuse to allow a party's solemn promise to be defeated by artful

pleading." 996 F.2d at 1360. This is, in fact, a theme reiterated in many of the cases cited by the Majority and in other forum selection clause cases. In contrast to *Doe* and *Roby*, however, this is emphatically *not* a case of "artful pleading" designed to get around a forum selection clause.

There can be no doubt that Harman had a cause of action against Wellmore for breach of contract, and a wholly separate cause of action against Massey for fraud and tortious interference with business relations and contracts, including tortious interference with the CSA. Harman obviously could not have sued Massey for breach of contract *because Massey was not a party to the contract.* Equally obvious, Harman could not have sued Wellmore for tortious interference with a contract *because Wellmore was a party to the contract,* and Wellmore did not commit the acts complained of.

More importantly, the duty owed to Harman by Massey did not arise out of the CSA and Massey's misconduct was not undertaken pursuant to the contract. The contract at issue in this case did not create the relationship between Harman and Massey; rather, Massey created the only relationship by carrying out unlawful acts pursuant to a scheme hatched even before Massey acquired United. The only duty owed by Massey was not to engage in intentional and unprivileged interference or to induce Harman to rely on misrepresentations to Harman's detriment. Unlike the claims in *Doe, Roby, Marinechance* and other cases cited by the Majority, these duties did not arise out of the contract, and the claims against Massey are not contract claims "artfully pled" and recast as torts.

The Majority asserts, however, that without Wellmore's breach of contract, Harman would not have been damaged by Massey's tortious conduct. Moreoever, for various reasons this is not a proper rationale for concluding that Massey can take advantage of the forum selection clause.

First of all, in order to prevail against Massey in this case for tortious interference with contract, Harman did not need to prove that the CSA was *breached* by Wellmore, just that it was terminated (damages being an element of tortious interference, but breach of contract not being an element). Harman could have lost the Virginia action and still won this case.

Second, the damages recoverable in Virginia for Wellmore's breach were established regardless of when or how the breach was accomplished. It did not matter to the damages awarded in the Virginia Case at all, for example, that Massey directed that force majeure be declared late in the year so that Harman had no hope of selling its coal elsewhere, nor did it matter at all that Massey misrepresented its intention to buy Harman and collapsed the deal that greatly increased Harman's damages.

Third, if tortious interference is all that is required to create a relationship sufficient to preclude suits anywhere other than the venue selected in a forum selection clause, then this Court has just made an across-the-board rule that is unprecedented.[7] No other Court has made such a rule.[8]

Even if this Court is intent on making such a rule, however, it should not be applied here because of the peculiar facts of this case – that is, that the interfering party was not a parent at the time of contracting, acquired a once-removed ownership interest in the contracting party (by its purchase of Wellmore's parent, United) only for the purpose of interfering with the contract, and divested itself of its ownership interest as soon as it was done with its interference. It should not

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[7] The Majority Opinion rested upon other unprecedentedly broad rules, including: 1) the cause of action for tortious interference with contract is the same cause of action as breach of contract for res judicata purposes; and 2) under Virginia law, all parties and all claims must be pursued in one action if they arise out of related transactions, events, or occurrences.

[8] The Third Circuit is one Court that has firmly rejected such a rule, even when the party accused of the interference was the parent of one of the contracting parties before, after and at the time of the interference and was still the parent at the time of suit. *See Dayhoff Inc. v. H. J. Heinz Co.*, 86 F.3d 1287, 1297 (3d Cir. 1996).

be applied in this case because it could not possibly have been within the parties' contemplation at the time of contracting that the forum selection clause would reach any such scenario.

The parties to the Harman-Wellmore contract had no reason to know that their forum selection clause would cover the kinds of causes of action tried in this case; therefore, application of fundamental principles of contract law requires the conclusion that the forum selection clause in the Harman-Wellmore CSA does not mandate trial of this action in Virginia.

B. Harman Had No Reason to Know that Massey, a Complete Stranger to the Contractual Relationship, Would One Day be Entitled to Enforce the Forum Selection Clause

Harman argued in its initial Rehearing Brief that the relationship that is crucial to the determination of whether a non-signatory can enforce a forum selection clause is the relationship between the non-signatory and the performance of the contract, and not the relationship between the claims in the lawsuit and the contract, as the Court stated in the Majority Opinion. The reason this is the relevant relationship is the signatories can be said to have reason to know, or to foresee, a non-signatory with a close relationship to the performance of the contract would be able to enforce the contract's terms. *See e.g., Hugel v. Corp. of Lloyd's*, 999 F.2d 206, 209 (7th Cir. 1993) ("In order to bind a non-party to a forum selection clause, the party must be 'closely related' to the dispute, such that it becomes 'foreseeable that it will be bound."); *Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd.*, 709 F.2d 190 (3d Cir. 1983) ("Thus, it was perfectly foreseeable that Coastal would be a third party beneficiary of an English contract, and that such a contract would provide for litigation in an English court."). *Clinton v. Janger*, 583 F.Supp. 284, 290 (D.C. Ill. 1984) (non-signatory can enforce forum selection clause because he "clearly was a foreseeable third party beneficiary."); *Dogmach Int'l Corp. v. Dresdner Bank A.G.*, 304 A.D.2d 396, 397 (N.Y. S.Ct., App. Div., 1st Dept. 2003) ("Although defendant was a nonsignatory to the

account agreements, it was reasonably foreseeable that it would seek to enforce the forum selection clause.").

Harman could not possibly have foreseen, at the time of contracting, that Massey would one day be able to enforce the forum selection clause in the Harman-Wellmore CSA. Massey was not then closely related to the contract and was never closely related to the contract. Rather, Massey was always an opponent of the contract. How can it ever be said that a contract signatory should be able to reasonably foresee that a total stranger to the contract, bent on destroying it, will be able to enforce it? Under well-established principals of contract law, Massey, therefore, cannot be allowed to enforce the forum selection clause at issue in this case.

IV. Justice Benjamin's Continued Participation in This Case Denies the Appellees Due Process

Justice Benjamin's refusal to recognize that his participation in this case presents a well-recognized, widely commented upon appearance of impropriety, constitutes a violation of the Fourteenth Amendment of the United States Constitution. The Appellees reiterate their request, as discussed in detail in the Appellees' previously filed briefs, that Justice Benjamin recuse himself from further participation in this case, and if he denies to do so, requests that the other members of the Court intervene to protect Harman's due process rights.

CONCLUSION

Now that Massey's numerous mischaracterizations of the record have been corrected, it should be apparent to the Court that the foundations of Massey's arguments for dismissal of this case are faulty. Thus, Harman requests affirmance of the Judgment below. In the alternative, given that Massey has failed to set a sufficient record to support its arguments, the case should be remanded so that the trial court can review the record in the Virginia Case to determine whether

there is an identity of parties, causes of action, and remedies so as to preclude this action, or for such other reason as this Court deems proper.

Respectfully submitted,

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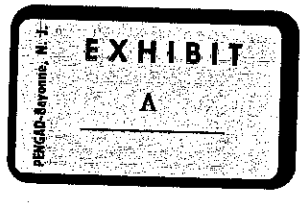
IN THE CIRCUIT COURT OF BOONE COUNTY, WEST VIRGINIA

HUGH M. CAPERTON, HARMAN DEVELOPMENT CORPORATION, HARMAN MINING CORPORATION, and SOVEREIGN COAL SALES, INC. Plaintiffs, v. A.T. MASSEY COAL COMPANY, INC., ELK RUN COAL COMPANY, INC., INDEPENDENCE COAL COMPANY, INC. MARFORK COAL COMPANY, INC. PERFORMANCE COAL COMPANY, and MASSEY COAL SALES COMPANY, INC. Defendants.	)	Case No. 98-C-192

DEFENDANTS' MOTION TO DISMISS

The Defendants, by counsel, pursuant to West Virginia Rule of Civil Procedure 12(b)(6), move the Court to dismiss the following claims, set forth by *Plaintiffs in their* Complaint and First Amended Complaint, on the grounds that they fail to state a claim on which relief can be granted. The Defendants aver that Plaintiffs' Complaint and First Amended Complaint (1) fails to state a claim against Defendants Elk Run Coal Company, Inc., Independence Coal Company, Inc., Marfork Coal Company, Inc., and Performance Coal Company; (2) fails to state a claim against all Defendants for tortious interference with various contracts, including the UMWA contract; and (3) fails to state a claim against all Defendants for negligent misrepresentation and negligent deceit. These grounds are explained in more detail in a Memorandum In Support which is filed herewith and incorporated herein as part of this Motion. The Defendants also hereby reserve their right to



12/3/01

supplement and/or amend this Motion and the Memorandum attached herein following the completion of discovery.

Respectfully Submitted,

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COUNSEL FOR DEFENDANTS

INSTRUCTION NO. 10

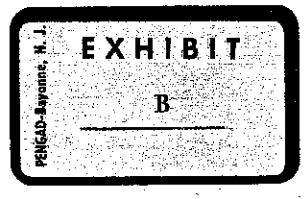
Finding Instruction

Measure for Damages

The measure for damages in this case is the profit, including its reasonable overhead, which Harman would have made had Wellmore fully performed the contract in 1998, together with any incidental damages caused by the breach.

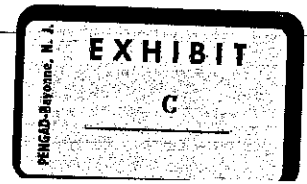
In applying this measure for damages, you should calculate the profit, including reasonable overhead, by taking the contract proceeds that Harman would have received from Wellmore in 1998, then subtracting the direct cost to mine and deliver the coal. You should not subtract unavoidable overhead expenses in making this calculation, nor should you deduct expenses unrelated to performing the contract in 1998. Profit including reasonable overhead, sometimes referred to as gross profit, is not the same as net profit. Reasonable overhead refers to those fixed expenses which Harman continued to incur in 1998 despite Wellmore's breach and which would have been satisfied by this contract. This formula is used because, in order to put Harman in as good a position, but no better or worse position, than if the contract had been performed, it is necessary to award Harman not only its profit, if any, but also its overhead expenses which would have been paid in 1998 but for Wellmore's breach.

Harman is also entitled to recover its costs reasonably incurred in partially performing the contract in 1998 and to its incidental damages, if any, resulting from Wellmore's breach. Incidental damages include any commercially reasonable charges, expenses, or commissions resulting from the breach.



Paragraphs in West Virginia First Amended Complaint Entirely Different From or Not Contained in Virginia Amended Motion for Judgment

Paragraph Number(s)	Subject Matter
1	Nature of Action, Jurisdiction and Venue
4, 5	The Parties
8 - 12	Plaintiffs Business
13 - 18	The Identity of the Defendants
19, 21, 22	Important Non-Parties
23	Background Regarding Metallurgical Coal
23, 41	The Harman Mine
52	Caperton Guarantees Obligations
53 - 56	Contractual Relations Between Harman Mining and the UMWA
57-59, 61, 62, 64, 65, 66, 68, 69	Commercial Relations between United Coal and LTV
70 - 72	A.T. Massey and the Massey Companies
73 -76	Operations of Marfork, Elk Run, Independence and Performance Coal Companies
77 - 80	Massey's Business Objectives
81 - 84	Massey's Interest in the LTV Business and in the Harman Mine
85 - 95	Malicious Scheme to Control Harman, Interfere With Its Business, Broaden the Demand for Massey Supplied Metallurgical Coal, and Acquire Harman Free of Union Obligations
	Massey's Execution of the Scheme
96 - 100	a. Purchase of United Coal and Its Wholly Owned Subsidiary, Wellmore
101 - 103	b. Interference with Wellmore's Operations
105 - 109	c Attempts to Persuade LTV to Transfer Business to Massey
110 - 113	d. Massey Directs United Coal to Propose Massey Coal Blends to LTV
114 - 117	e. Massey Markets Coal from the Massey Operations to US Steel
120 - 122	g. Little or No Effort by Massey to Market Harman Coal
125	Preposterous Position that 1197 CSA's Force Majeure Provision Applied
129 - 133	Preposterous Position that an Event of Force Majeure Caused Wellmore's Nonperformance
	Frauds Perpetrated by Massey in the Course of Carrying Out the Scheme
134 - 138	a. Facts Known to Massey



139 - 141	b. Concealment of Material Facts
142 - 149	c. Fraudulent Misrepresentations, Omissions and Tortious Interference Continue
150 - 155	d. The November Meeting: More Frauds and Tortious Interference
156, 158, 159	e. Declaration of Force Majeure
160 - 174	f. Misrepresentations Continue in "Settlement talks"
176 - 184	Harman's Business is Destroyed and, in the Process, So Too are Contracts Between Harman and Wellmore, Harman and Penn Virginia, and Harman and UMWA
185 - 190	Massey's Scheme to Obtain Control Over Splashdam Seam Reserves of Premium Quality Metallurgical Coal Continues
191 - 2002	Defendants; Misconduct Has Caused Personal Injury and Damages To Caperton
203 - 208	Count I: Tortious Interference With Existing Contractual Relations
209 - 214	Count II: Tortious Interference With Prospective Contractual Relations
215 - 220	Count III: Fraudulent Misrepresentation/Deceit/Concealment
221 - 225	Count IV: Civil Conspiracy
226 - 229	Count V: Negligent Misrepresentation/Deceit
230 - 233	Count VI: Punitive Damages

Hugh M. Caperton, et al.

v.

A.T. Massey, et al.

Case No. 98-C-192

List of Plaintiffs' Trial Exhibits From West Virginia Case That Were Also Admitted in the Virginia Case

Ex. No.	Description	Date of Document	Date Admitted
133	1997 Coal Supply Agreement	1/1/97	6/18/02
135	Wellmore: Cost Analysis	01/01/97	7/22/02
194	Chart LTV Coal Sales – Annualized Tons	5/15/97	6/26/02
235	EPA Press Release	7/14/97	7/12/02
267	Memo from Suboleski to Blankenship & Short	8/1/97	6/25/02
269	Letter from Suboleski to Cook	8/5/97	6/19/02
309	Letter from Chilcot to Smonko	9/25/97	7/3/02
340	Letter from Caperton to Suboleski	11/6/97	7/8/02
352	Letter from Suboleski to Caperton and Cook	12/1/97	6/19/02
380	Letter from Caperton to Ashurst	1/2/98	7/8/02
549 A - D	Pictures of Harman Office and Mine Site	3/11/99	6/18/02

Hugh M. Caperton, et al.

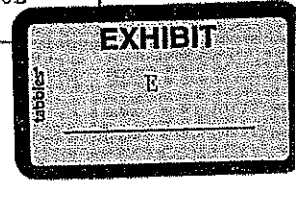
v.

A.T. Massey, et al.

Case No. 98-C-192

List of Plaintiffs' Trial Exhibits Admitted in the West Virginia Case but not the Virginia Case

Ex. No.	Description	Date of Document	Date Admitted
6	Benefits Received by Terra Industries Inc.	Undated	6/18/02
13	Drill Hole 9-82 Bed Section	Undated	6/25/02
14	Chart on rocks, thickness (Drill Hole Record)	4/12/81	6/25/02
16	Harman Development Financial Reports and Financial Statements	Undated	6/24/02
22	LTV Steel Purchase Order Premier Coal	Undated	7/22/02
27	Overview (Acquisition of United Coal)	Undated	7/17/02
27a	Acquisition of United Coal Co.	Undated	7/17/02
29	Pillar Cut Drawing	Undated	6/26/02
34	Map	Undated	7/15/02
38	Stagg Weighted Average Sequencing Worksheet	Undated	6/26/02
40	Strip Log	5/22/02	6/25/02
45	Harman Mining Corp. Major Payments – 1997	Undated	7/3/02
49	Work Notes: Calculation of Rate of Advance (Time at face)	5/13/99	6/26/02
58	1989 HMC Mine Plan	1/1/89	6/18/02
68	Letter from H. Caperton to Inspiration Coal	1/11/93	7/8/02
69	Newspaper Article from Bluefield Daily	7/19/93	6/18/02
73	Memorandum from Suboleski re Reserves at United	8/2/94	6/25/02 7/18/02
96	Comparison of Marfork Eagle Quality v. Va. Coals	06/21/96	7/19/02
119	Appendix D to Stagg Business Valuation Report	00/00/97	6/26/02
120	Conceptual Mine Plan	00/00/97	6/26/02
123 A	Production Forecast Schedule	Composite	6/26/02
123	Production Forecast: Different time frame than 123A	01/17/02	6/26/02
124	Stagg Operational Damage Summary	00/00/97	6/26/02
125	Stagg Summary of Operating Costs	00/00/97	6/26/02
126	Summary of Manpower	00/00/97	6/26/02
136	Lease and Sublease Agreement – Harman Areas	1/1/97	7/3/02
139	Settlement Agreement – Inspiration to Harman Development Corp.	1/1/97	7/8/02
142	Guaranty: Caperton (Guarantor), etc.	1/13/97	7/8/02
145	Letter from Caperton to Inspiration Coal	1/21/97	7/8/02
150	Proposal to Lease	3/17/97	7/8/02
155	Guaranty / Lessee: H & M Equipment Company, Lease Number 138001	4/3/97	7/8/02



Ex. No.	Description	Date of Document	Date Admitted
156	Master Lease Agreement entered into between Vision Financial Group and H & M Equipment Company; Certificate of Incumbency and Corporate Authority; Equipment Schedule Acceptance Certificate; UCC	4/3/97	7/8/02
188	Letter from Gardner: Letter of Intent (draft)	05/09/97	7/22/02
208	Memo from D. Fortner to D Wampler re 1998Tonnage Projections	6/5/97	6/19/02
213	AT Massey Coal Co. AFE Acquisition of United Coal Company	6/6/97	6/25/02
218	Acquisition of United Coal Company	6/5/97	7/22/02
219	File Memorandum: to: United from Hatfield	6/18/97	7/8/02
225	Letter from T. Smith to W. Jackson (US Steel)	6/30/97	6/25/02
226	D. Blankenship (notes from Ben Hatfield)	6/30/97	7/22/02
237	Smith Ex. 128	07/14/97	7/24/02
243	Letter from Fry to Caperton	12/16/96	7/8/02
244	United Coal Company AFE, Economic Assumptions (AFE Base Case w/Due Diligence Adjustments & LTV Reduction)	7/21/97	6/25/02
246	Letter from Fry to Caperton	12/19/96	7/8/02
252	Memorandum to Don Blankenship from Jim Gardner	7/30/97	7/22/02
253	Supplier's Affidavit (Gary B. Chilcot)	07/30/97	7/3/02
253 A	Supplier's Affidavit (Gary B Chilcot)	07/30/97	7/8/02
275 A	Certified Coal and Coke Company memo from Naso to Chilcot and Blankenship regarding recommended coal blend alternatives for LTV Steel in 1998	9/1/97	7/3/02
288	Memo from J. Wilson to Blankenship regarding LTV meeting in Cleveland – September 11, 1997	9/16/97	6/25/02
294	Letter to Gary Chilcot from Dennis Smonko	9/17/97	7/22/02
297	Dep. Exhibit 1998/2002 High Volatile Coal	09/17/97	7/15/02
300	Letter to Don Blankenship from Jeff Wilson	09/19/97	7/15/02
301	Memo from Wilson to Blankenship regarding LTV Draft Proposal (Handwritten notes to Jeff and Tom from Don)	9/19/97	7/3/02
310 (2)	Letter from Gary Chilcot re 1998 – 2002 Coal Requirements	09/25/97	6/25/02
310	Letter from United Coal re 998-2002 LTV Req.	9/25/7	6/19/02
311	Handwritten notes from 1/9/97, 814/97 and 10/5/97 with Suboleski, Fortner and Deskins	10/3/97	6/25/02
313	United Coal memo from Chilcot to Blankenship regarding planned shutdown of LTV's Pittsburgh Coke Plant	10/6/97	7/3/02

Ex. No.	Description	Date of Document	Date Admitted
315	Inter-company memorandum from Suboleski to Blankenship & Hatfield regarding Harman Reserves / Tom Deskins (Tom offered to sell them Virginia Minerals and Mountain Hawk)	10/9/97	6/25/02
320	Letter from C. Stacy to Suboleski: Wellmore & Assets	10/17/97	6/25/02
328	Fax from Blankenship to Hipple & Smonko attaching offer in written form	10/23/97	7/3/02
333	Letter from Blankenship to Hipple (LTV Steel) regarding Pittsburgh Works closing	10/27/97	6/25/02
334	Memorandum from Ben Hatfield to Don Blankenship	11/17/97	7/8/02
335	Fax to Richard Hippie from Don Blankenship	10/28/97	7/19/02
335	Fax from Don Blankenship to Richard Hipple	10/28/97	7/22/02
337	Inter-company memorandum from Suboleski to Blankenship regarding conversation with C. Stacy of Rapoca Energy	10/30/97	6/25/02 7/18/02
350 (A)	Notes of 11/26/97 Update on Wellmore	11/26/97	7/19/02
353	Fax from Caperton to Ben Hatfield regarding Confidentiality Agreement	12/2/97	7/8/02
359	Letter from Gary Chilcot to Jeff Wilson	12/3/97	7/22/02
367	Letter to Lonnie McClanahan from Caperton from Caperton	12/18/97	7/10/02
370	Settlement Agreement between UMWA Combined Benefit Fund, 1992 UMWA Benefit Plan, Terra Industries and Harman Mining	12/23/97	7/8/02
374	Letter from Wellmore Coal (Andrew Ashurst) to Sovereign Coal and Harman Milling regarding Coal Supply Agreement dated January 1, 1997	12/29/97	7/8/02
378	Stagg Production Sequencing Worksheet	00/00/98	6/26/02
379	Worksheet: Rate of Advance and Retreat Mining 1997-1998	12/4/01	6/26/02
381	Letter from Ashurst to Caperton regarding response to letter regarding Coal Supply Agreement dated January 1, 1997 between Wellmore Coal Corporation and Sovereign Coal Sales	1/5/98	7/8/02
385	Letter from Horton to Hatfield regarding enclosing CD containing maps of VA Minerals	1/8/98	7/3/02
389	Fax from Steve Looney to Ben Hatfield – Confidentiality Agreement signed by Hatfield	1/9/98	6/25/02
391	Letter from Harman (Caperton) to Inspiration Coal (Kalafut) summarizing discussion regarding the status of negotiations with A. T. Massey Coal company and Wellmore Coal	1/9/98	7/8/02
408	Fax from A. T. Massey (Hatfield) to Tom Deskins enclosing Proposed Agreement to Terminate the Wellmore Coal Supply Agreement	1/26/98	7/8/02

Ex. No.	Description	Date of Document	Date Admitted
428	Memo from Ben Hatfield to George Kay, Mark Clemens, Jeff Jaroskinski and Jim Twigg regarding Attached Economic Analysis of Potential Virginia Minerals/Harman Transaction (Base case with Pittston)	2/6/98	6/19/02
429	Economic Analysis	Undated	7/30/02
435	Letter to Ben Hatfield from Don Blankenship	2/9/98	7/19/02
437	Letter to Hugh Caperton from A. T. Massey (Ben Hatfield) regarding Proposed Agreement to Terminate the Wellmore Coal Supply Agreement	2/9/98	7/8/02
439	Fax from Wilson to Hatfield	2/10/98	7/26/02
441	Letter from Harman (Caperton) to Terra (Meyer) enclosing Letter of Intent from A. T. Massey regarding the settlement contract dispute and a list of the creditors	2/10/98	7/8/02
445	Memo from G. Chilcot to File re LTV	2/13/98	7/3/02
451	Intercompany memo from Ben Hatfield to Don Blankenship regarding Signed Letters of Intent on the Virginia Minerals transaction	2/19/98	7/8/02
452	Handwritten notes of Campbell	2/19/98	7/26/02
458	Additional handwritten notes of Campbell	2/26/98	7/26/02
469	Letter from Nicholson to K. Horton regarding enclosing Amendment of Lease between Penn VA and VA Minerals	3/6/98	7/3/02
475	Letter from Looney to Nicholson regarding compromise Penn VA is willing to make	3/9/98	7/3/02
477	Virginia Minerals-Revenue Upside w/Pittson: Assumption	3/9/98	7/15/02
479	Virginia Minerals Revenue Upside w/Pittston	3/9/98	7/15/02
481	Fax from Hugh Caperton to Ben Hatfield Accounts Payable – Harman Development Corp.	3/10/98	7/8/02
503	Handwritten notes of Campbell regarding Pittston Meeting	3/27/98	7/26/02
519	Letter from R. King (Robertson, Cecil, King & Pruitt) to Caperton regarding Default in loan secured by Deed of Trust dated 12 January 1997	4/16/98	7/8/02
520	Letter from Grundy National (Gillespie) to Harman regarding default of account	4/22/98	7/8/02
533	E-mail from Hatfield to Gay regarding location of splashdam	5/8/98	7/8/02
535	Complaint (Senstar Finance Company v. H & M Equipment, Caperton, Hannan)	5/12/98	7/8/02
543	Final Judgment in Buchanan County Circuit Court	10/2/98	7/8/02
555 (1)	Chart: Calculation of rate of advance	12/4/01	6/26/02
556	Intercompany memo from Hatfield to Blankenship regarding proposed settlement offer from Tom Deskins	5/14/99	6/21/02

Ex. No.	Description	Date of Document	Date Admitted
556	Intercompany memo from Hatfield to Blankenship regarding proposed settlement offer from Tom Deskins	5/14/99	7/8/02
561	Extremely Confidential Settlement of Deskins Litigation	6/4/99	7/8/02
565	Memo from Tommy Wilson to Ben Hatfield	1/21/98	7/26/02
572	Proof of Claim of Terra Industries	1/13/00	7/8/02
582	Proof of Claim of Vision	9/5/00	7/8/02
606	Claims Register Report for Harman Mining Corporation	11/12/01	7/8/02
618	Applicator Violator System Evaluation Report	3/12/02	7/10/02
620	Map depicting reserves adjacent to the Harman mine which Massey acquired from Pittston	Undated	6/25/02
621 (A)	Statement of Consolidated Earnings	5/15/02 est	7/15/02
621 (B)	Statement of Cash Flow	5/15/02 est	7/15/02
621 (C)	Consolidated Balance Sheet	5/15/02 est	7/15/02
623	Report: 5/15/02 prepared by: Mark Gleason	05/15/02	7/15/02
624 A	Map from Stagg Report	Undated	6/25/02
624	Appraisal of the Enterprise value	05/15/02	6/26/02
625	Report: Stagg Valuation of Harman Mining	05/15/02	6/26/02
626	Report Dated 1-25-02 - Caperton's Personal Damages	1/25/02	7/16/02
627	Selby Report on Damages	3/25/02	7/16/02
629	Input used in minecost model – Rubber Tired Haulage (1999-2004)	Undated	6/26/02
630	Hugh Caperton's Personal Damages	2/6/98	7/16/02
632	Chart: Cash Flow Chart	Undated	6/24/02
633	Chart comparing charts Massey, Stagg + McGuire Mining Rates of Advance	Undated	6/26/02
634	Chart/Board: Comparison of Stagg, McGuire and Massey Costs of Mining	Undated	8/1/02
636	Letter to Ben Hatfield from Don Blankenship	10/13/97	7/19/02
637	Massey Energy Co. Proxy	4/16/02	7/19/02
638	Supply Side: Blankenship Sees Big year for Massey	2002	7/19/02
640	Article: A Coal Mining Production Function Appendix C by M. Hicks	Undated	7/23/02
642	Letter to Gary Chilcot from Don Blankenship	6/3/97	7/24/02
644	Chart – Chisholmn Mines	01/17/02	7/25/02
645	Stagg Notes regarding roof control	Undated	7/30/02
646	Chart/Board: Annotated Chart on "Caperton Benefits"	Undated	8/1/002
647	Flip Chart: Drawing Showing Stagg Roof Bolt Plan	Undated	8/1/02

INSTRUCTION NO. 2

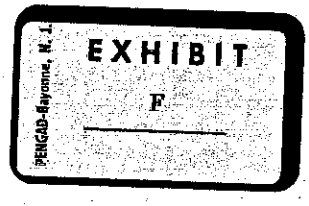
The issues in this phase of the trial for you to decide are:

A. Whether Harman would have performed its contractual obligations had Wellmore not breached the contract.

B. Whether Harman suffered any damages as a proximate result of Wellmore's refusal to purchase the full 573,000 tons of coal from Harman in 1998.

C. Whether Harman reasonably mitigated its damages.

D. If Harman suffered any damages that it could not reasonably mitigate, what is the reasonable amount thereof.



INSTRUCTION NO. 1

The issues in this matter for you to decide are:

A. Whether Wellmore refused to purchase the 573,000 tons of coal from Harman in 1998.

B. Whether there was a force majeure event at the plant or facility of a Wellmore customer, LTV Steel Corporation.

C. Whether the force majeure event prevented Wellmore from supplying coal it would have otherwise supplied to LTV.

INSTRUCTION NO. 2

Finding Instruction

This case involves a contract for Wellmore to purchase from Harman 573,000 tons of coal in the year 1998, subject to certain conditions.

The Court instructs you that if you believe that Harman has proven, by a preponderance of the evidence, that Wellmore breached the contract by wrongfully refusing to purchase the full 573,000 tons of coal in 1998 then you shall find for the Plaintiff, Harman.

The Court further instructs you that, if you believe that Wellmore has proven, by a preponderance of the evidence, that it was relieved from purchasing the full 1998 base quantity of 573,000 tons of coal because it was entitled under the terms of the contract to reduce its purchases proportionally if [redacted] its customer, LTV Steel, had a "force majeure event" which resulted in the shut down of its Pittsburgh Plant, then you shall find for the Defendant, Wellmore.

INSTRUCTION NO. 3

Harman has the burden of proving that Wellmore refused to purchase the full 573,000 tons of coal in 1998.

Wellmore has the burden of proving its force majeure defense.

VIRGINIA:

IN THE CIRCUIT COURT OF BUCHANAN COUNTY

HARMAN MINING CORPORATION and
SOVEREIGN COAL SALES, INC. PLAINTIFFS

V. CASE NO. 226-98

WELLMORE COAL CORPORATION DEFENDANT

VERDICT

We, the jury on the issues joined, find that Wellmore breached the Coal Supply Agreement, and find in favor of Harman.

Johnny Proffitt
FOREPERSON

We, the jury on the issues joined, find that Wellmore properly declared force majeure under the Coal Supply Agreement and find in favor of Wellmore.

FOREPERSON

EXHIBIT
H

VIRGINIA:

IN THE CIRCUIT COURT OF BUCHANAN COUNTY

HARMAN MINING CORPORATION and
SOVEREIGN COAL SALES, INC.

Plaintiffs

vs.

CASE NO. 226-98

WELLMORE COAL CORPORATION

Defendant

VERDICT

We, the jury, find that as a result of Wellmore's breach of the Coal Supply Agreement, Harman is entitled to damages in this case in the following amount:

$ 6,000,000.00
6 million

Sam Browning
FOREPERSON

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
APPEAL NO. 33350

A.T. MASSEY COAL COMPANY, INC.,
ELK RUN COAL COMPANY, INC.,
INDEPENDENCE COAL COMPANY, INC.,
MARFORK COAL COMPANY, INC.,
PERFORMANCE COAL COMPANY, and
MASSEY COAL SALES COMPANY, INC.,

Appellants,

v.

HUGH M. CAPERTON,
HARMAN DEVELOPMENT CORPORATION,
HARMAN MINING CORPORATION,
SOVEREIGN COAL SALES, INC.,

Appellees.

CERTIFICATE OF SERVICE

The undersigned counsel for the Corporate Plaintiffs-Respondents, do hereby certify that I have served the foregoing **Response of Appellees, Harman Development Corporation, Harman Mining Corporation and Sovereign Coal Sales, Inc.,** by U.S. Mail, this 25th day of February, 2008.

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